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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 IN RE TESLA, INC. SECURITIES
17 LITIGATION

18 Case No. 3:18-cv-04865-EMC

19 CLASS ACTION

20 **LEAD PLAINTIFF'S RESPONSE TO**
21 **DEFENDANTS' ADMINISTRATIVE**
22 **MOTION TO FILE UNDER SEAL**
23 **(ECF NO. 364)**

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I. INTRODUCTION

2 For decades, the Ninth Circuit has upheld and protected the public’s access to court-filed
3 documents. *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016);
4 *Kamakana v. City & Cty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006); *Hagestad v.*
5 *Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). This policy emanates from binding Supreme Court
6 precedent creating a “general right to inspect and copy public records and documents.” *Nixon v.*
7 *Warner Commc’ns*, 435 U.S. 589, 597 (1978). Where, as here, the request for sealing exists in the
8 context of a dispositive motion, the right to access court documents becomes ever more important
9 because it strikes “at the heart of the interest in ensuring the public’s understanding of the judicial
10 process” *Kamakana*, 447 F.3d at 1179 (internal quotations omitted). Movants seeking to seal
11 documents must satisfy a “compelling reasons” standard that requires a “factual basis” for the
12 request instead of “hypothesis or conjecture.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678-
13 79 (9th Cir. 2010). Defendants do not carry their burden under the law and, therefore, their request
14 for sealing should be denied.

15 In opposition to Plaintiff's Motion for Partial Summary Judgment, Defendants filed
16 twenty (20) exhibits that they presently seek to keep under seal. The public version of their brief
17 in opposition to the motion was also heavily redacted. The sealing of these exhibits and the
18 redactions on their brief are unfounded. The exhibits contain internal emails and text messages as
19 well as transcripts of depositions and other testimony. Although these materials were marked
20 "confidential" under the Stipulated Protective Order (ECF No. 255), that alone does not provide
21 Defendants with the ability to keep them under seal. *See* N.D. Cal. Civil L.R. 79-5(c) ("Reference
22 to a stipulation or protective order that allows a party to designate certain documents as
23 confidential is not sufficient to establish that a document, or portions thereof, are sealable.").
24 Further, when considering that the subject matter of these materials is an event that occurred
25 nearly four years ago and does not impact any aspect of Defendants' ongoing business concerns
26 in any way, no compelling reason exists to keep these materials hidden from the public.

27 Defendants make no factual showing to substantiate their claim that these materials are

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1 “sensitiv[e]” in nature or otherwise contain any information that will “cause harm to Tesla” or
 2 “be misconstrued for improper purposes.” Defs. Admin. Mot. at 2, 3 (ECF No. 364). The
 3 substance of these documents is already largely in the public domain via the U.S. Securities &
 4 Exchange Commission’s court filings and the myriad news articles covering the debacle when it
 5 first occurred. *See Oliner v. Kontrabecki*, 745 F.3d 1024, 1026 (9th Cir. 2014) (finding that the
 6 “compelling reasons” standard was not satisfied where information “had been a matter of public
 7 record since at least 2004”). Thus, any risk of harm to Defendants’ business concerns has long
 8 since passed and does not outweigh the well-established public right of access. To the extent
 9 Defendants are concerned with their right to a “fair trial,” the unsealing of the documents at issue
 10 should be viewed as a positive given that they presumably consist of the exculpatory materials
 11 they intend to use at trial. Defendants’ motion to seal should be denied.¹

12 **II. DEFENDANTS’ BRIEF AND EXHIBITS SHOULD NOT BE KEPT UNDER
 13 SEAL BECAUSE THERE IS NO “COMPELLING REASON” TO DO SO.**

14 **A. Stale, Internal Emails and Text Messages.**

15 Thirteen of the 20 exhibits Defendants seek to file under seal are emails and/or text
 16 message conversations.² These emails and text messages date back to August 2018 and earlier
 17 and relate to the “Take Private Bid.” *See* Declaration of Nathaniel Smith, ¶5 (ECF No. 364-1);
 18 *see also* Declaration of Kyle Batter (ECF No. 364-4). They do not contain discussion about, for
 19 example, Tesla’s business strategies or competitive weaknesses. While Tesla may have had a
 20 “practice” of maintaining communications as “strictly confidential,” such a practice does not
 21 trump the longstanding policy of providing public access to judicial records. *See Kamakana*, 447
 22 F.3d at 1180 (requiring particularized showing of “compelling reasons” to keep records sealed
 23 instead of “good cause” showing under Rule 26). Further, Defendants’ “belief” that the
 24 individuals in the emails and text messages expected them to remain private constitutes only

25 ¹ The documents at issue in this administrative motion are similar in nature and content to the
 26 documents at issue in Plaintiff’s Administrative Motion for Sealing filed January 11, 2022 (ECF
 27 No. 351).

28 ² The exhibits are: 76; 81; 94; 105; 106; 109; 121; 182; 255; F; G; H; and J.

1 speculation and conjecture which cannot substantiate the sealing of these materials. *See Pintos*,
 2 605 F.3d at 678-79. Declarations from these third-parties are notably absent.

3 Defendants' declaration in support of the administrative motion reveals that Exhibits 81
 4 and 94 are communications with Tesla's Board of Directors "reflect[ing] the private information
 5 that was provided" to them in connection with the "Take Private Bid." Smith Decl. at ¶6. Thus,
 6 the communications do not contain sensitive, internal strategy discussions *from* the board but
 7 instead information from other parties sent *to* the board that, once again, relates to a one-off event
 8 occurring nearly four years ago. Similarly, Tesla's communications with a "potential investor"
 9 likewise do not contain internal, sensitive discussions. *Id.* at ¶7 (referring to Exhibits 76, 105,
 10 106, 109, F, G, and H). In addition, communications sent from or to a third-party do not carry any
 11 expectation of privacy or otherwise contain commercially sensitive information, contrary to what
 12 Defendants claim. *See id.* at ¶¶8, 9 (referring to Exhibits 121, 182, 255 and J).³

13 **B. Deposition and Testimony Transcripts.**

14 Defendants also ask that they be allowed to file under seal excerpts of several transcripts
 15 from SEC testimony and depositions.⁴ Defendants' description of these excerpts reveals that the
 16 substance of these transcripts does not relate to Tesla's business or commercial strategies. *See*
 17 Smith Decl. at ¶11. Instead, the testimony discusses meetings held between Musk, Tesla's Board
 18 of Directors, and third-parties concerning the "Take Private Bid." *Id.* These meetings were not
 19 "privileged" (as evidenced by the witnesses' discussion of the meetings during their respective
 20 interviews and/or depositions) and related solely to the "Take Private Bid." *Id.* Unsealing these
 21 excerpts will not reveal "financial, planning, personal, and commercial information" because no
 22 such information was discussed in the interview and/or deposition excerpts; indeed, Defendants'
 23 description of the excerpts does not reference any sort of information or material. *See id.* at ¶¶11,
 24 12. Defendants' failure to provide a particularized explanation as to how the information would
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26 ³ Plaintiff does not oppose the redaction of any "personal contact information" that may appear
 27 in these documents.

28 ⁴ The exhibits are: B; C; E; O; P; and Q.

1 be misused is fatal to their motion. *See, e.g., In re Twitter Inc. Sec. Litig.*, No. 16-cv-05314-JST,
 2 2020 U.S. Dist. LEXIS 86974, at *8 (N.D. Cal. May 18, 2020) (collecting cases).

3 Defendants' claim that the unsealing of this information risks the "spread" of it without
 4 "proper context" and risks "Tesla's ability to receive a fair trial" is unfounded. Given that these
 5 excerpts are what Defendants selected in an attempt to defeat summary judgment, it presumably
 6 contains the exculpatory information needed to clear Musk's name. Further, if Defendants are
 7 truly concerned about the public not having full "context" for the testimony, the entire transcripts
 8 can be made available which would ensure that all those interested have a complete understanding
 9 of what occurred. *See Kamakana*, 447 F.3d at 1179 ("The mere fact that the production of records
 10 may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not,
 11 without more, compel the court to seal its records.").

12 **C. Defendants' Opposition Brief.**

13 Defendants redacted large swaths of their brief in opposition to Plaintiff's motion for
 14 partial summary judgment (275 out of 700 lines, to be exact). The content of these redacted
 15 portions describes, paraphrases, or quotes the internal correspondence and transcripts discussed
 16 above. Because those materials do not warrant sealing, the redactions are similarly unfounded and
 17 should be removed.

18 **D. Dr. Michael Hartzmark's Expert Report.**

19 Dr. Hartzmark is Plaintiff's damages expert. Although Plaintiff marked his report (Exhibit
 20 L) as "confidential" under the terms of the Stipulated Protective Order when serving it to
 21 Defendants, he did so only to comply with the terms of the Stipulated Protective Order insofar as
 22 it incorporated and/or relied on information marked "confidential." However, Plaintiff does not
 23 see any reason to keep the report "confidential," much less the narrow excerpt Defendants filed
 24 under seal. Indeed, the excerpt contains charts depicting movements in Tesla's stock price and
 25 trading as well as copy/pasted portions of public news articles and blog posts. These do not
 26 warrant "confidential" treatment let alone filing under seal.

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1 **III. CONCLUSION**

2 For the reasons stated above, Plaintiff respectfully requests that the Court deny
3 Defendants' Administrative Motion to File Under Seal (ECF No. 364).

4 Dated: February 4, 2022

Respectfully submitted,

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